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No. 84-1868

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

PENNZOIL COMPANY,
Petitioner,

v.

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals for the State of West Virginia

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REPLY BRIEF OF PENNZOIL COMPANY TO BRIEF IN OPPOSITION TO PETITION

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On May 29, 1985, Pennzoil Company (Pennzoil) filed its Petition for a Writ of Certiorari in this case.[1] On June 28, 1985, the Public Service Commission of West Virginia (PSC) filed its Brief in Opposition to Pennzoil's Petition. In this Reply Brief, Pennzoil corrects an inaccurate factual assertion in the PSC's Brief.

ARGUMENT

The PSC's Brief all but ignores the central issue in this case, which is whether the "first sale" of Pennzoil's natural gas production occurs in interstate commerce. However, the PSC does make one unsupported factual assertion that requires a response. In discussing the schematic representation of Pennzoil's operations that

[1] A listing of Pennzoil's non-wholly owned subsidiaries was included in Pennzoil's Petition for a Writ of Certiorari in this case. *See* Petition at ii. n.*.

was provided as Figure 1 in Pennzoil's Petition, the PSC states that "in many cases petitioner's produced gas is never sold to an interstate pipeline for resale." PSC Brief at 3 n.4. Presumably, that assertion is intended to cast doubt on the factual basis for Pennzoil's argument that the "first sale" of Pennzoil's production, at the wellhead, takes place in interstate commerce. As the PSC already is aware, however, that assertion is inaccurate.

The PSC raised a similar argument in its brief before the West Virginia Supreme Court. In response, Pennzoil informed the court, and the PSC, that the total amount of gas sold to retail customers from wells that do not currently supply any gas to interstate pipelines constitutes less than 7 percent of the total volume of gas at issue in this case. Thus, the "commingling doctrine" is applicable to all but a *de minimis* amount of Pennzoil's production in West Virginia.

Even as to the small amount of Pennzoil's production that is not subject to the commingling doctrine, the legal result is not any different. As explained in Pennzoil's Petition, Section 602 of the NGPA is still inapplicable to that gas, because the West Virginia Legislature has not implemented Section 602, and because the PSC cannot set "maximum lawful prices" on a case-by-case basis. *See* Petition at 17-20. Therefore, the NGPA price established by Congress is the wellhead price which must be used by the PSC as a component in setting the ultimate retail rate.[2]

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[2] The PSC's additional factual assertion that "in many other cases, petitioner's gas is not commingled with another producer's gas prior to or after petitioner's retail sale in West Virginia," is simply irrelevant. The "commingling doctrine" is applicable to Pennzoil's production because a substantial part of that gas will be transported, and ultimately sold, outside of West Virginia. Public Service Commission of Kentucky v. FERC, 610 F.2d 439, 444 (6th Cir. 1979). Regardless of whether Pennzoil's production is eventually mixed with that of another producer, the first sale of Pennzoil's gas, at Pennzoil's wellhead, occurs in interstate commerce.

CONCLUSION

For the reasons set forth in Pennzoil's Petition, Pennzoil requests this Court to grant certiorari.

Respectfully submitted,

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